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THE INTERNET AND HATE SPEECH: AN EXAMINATION OF THE NUREMBERG FILES CASE

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The Internet is a resource for many types of personal information including telephone numbers and addresses. Because the Internet is a communications medium that does not always identify its users, it is difficult to know who is making use of the information posted there, or whether there are Web sites that list such information within specific contexts. This article examines the ruling of the United States Court of Appeals for the Ninth Circuit in the 2002 Planned Parenthood case involving a Web site, the Nuremburg Files, that listed names, addresses and telephone numbers of abortion providers across the country. Using the 1969 Brandenburg *test for incitement, the court ruled that the Web site threatened the doctors' safety and ordered it shut down. The article concludes that the spirit of the* Brandenburg *test can be applied to Internet-based speech. Anyone who uses the Internet to threaten an individual or group should not be protected by the First Amendment.*

Imagine trying to go to work every day knowing your life is under a constant threat by a group of people that fundamentally opposes how you earn your living. Then imagine that personal information—your address and telephone number—appears on a Web site. Finally, what if people who are in the same occupation as you are killed, and their murderers used the Internet to tell the world that society is a better place without people like them—and you? It is a scenario that no one should ever experience.

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In May 2002, the United States Court of Appeals for the Ninth Circuit, meeting *en banc*, ruled that anti-abortion protest posters and a Web site affiliated with the American Coalition of Life Activists (ACLA) constituted a direct threat to some doctors who performed abortions in Oregon.[1] The court ruled that since many of the doctors had to wear bulletproof vests to work, they were threatened by ACLA's posters and its Web site, called the "Nuremburg Files."[2] After one doctor was murdered, his name was placed on the Web site with a gray line running through it,[3] indicating that he had been killed, according to a key to the site identifying doctors who had been killed or injured. The majority opinion stated the ACLA should have realized the posters and Web site constituted a direct threat to the doctors.[4] This is the first court case where a Web site was found to be threatening because it espoused incitement to violence.[5]

Traditional hate speech often includes offensive racial, ethnic or religious slurs made by a person toward individuals or groups in verbal, written or visual forms.[6] Hate speech also includes invectives made against a group based on occupation, such as doctors who perform abortions.[7] With Internet hate speech, the ideas are placed on Web sites.

The Supreme Court of the United States has repeatedly stated that specific elements of hate speech, such as threats and incitement to violence, are not protected under the First Amendment.[8] The

[1]Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists, 290 F.3d 1058 (9th Cir.2002) (en banc).

[2]The majority opinion stated that the "Wanted" posters and the Nuremburg Files Web site were part of a campaign against abortion providers. According to the judges, the Web site's goal was "collecting dossiers on abortionists in anticipation that one day we may be able to hold them on trial for crimes against humanity." *Id.* at 1080. According to the judges, the Web site stated that its name was based on the war crimes trial from World War II:

> One of the great tragedies of the Nuremburg trials of Nazis after WWII was that complete information and documented evidence had not been collected so many war criminals went free or were only found guilty of minor crimes. We do not want the same thing to happen when the day comes to charge abortionists with their crimes. We anticipate the day when these people will be charged in PERFECTLY LEGAL COURTS once the tide of this nation's opinion turns against child-killing (as it surely will).

Id. at 1080.

[3]*Id.* at 1063.

[4]*Id.*

[5]A LEXIS word search for "violence" and "Internet" indicated that was the first case involving an allegedly threatening Web site.

[6]*See* SAMUEL WALKER, HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY 8 (1994).

[7]*Id.* at 2.

[8]*See, e.g.,* Virginia v. Black, 538 U.S. 343 (2003); Brandenburg v. Ohio 395 U.S. 444 (1969); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

Court has also upheld state laws that allow punishment of people beyond mere words.[9] In its most recent case, *Virginia v. Black*, the Court, by a 6–3 vote, ruled that cross burning is not protected speech when its intent is to intimidate.[10] The Court ruled that a prohibition on true threats protects people from a fear of violence, and that intimidation is a true threat.[11] The Court distinguished the cross burning case from that of *R.A.V. v. St. Paul,*[12] in which a city ordinance against hate speech was held unconstitutional because it protected certain groups from hate speech while leaving out others.[13]

In cases like *Virginia* and *R.A.V.*, as indicated, the Court has defined hate speech within the context of incidents such as cross burning, incitement to violence and use of fighting words. What it has not done is apply its treatment of hate speech and incitement to Internet communications. The Supreme Court said in *Reno v. American Civil Liberties Union*,[14] that the Internet is a unique, new medium of communication, and, as a result, should enjoy maximum protection under the First Amendment.[15] But the Court has not yet ruled on an online hate speech case; it denied writ of *certiorari* in the Nuremburg Files case.[16]

This article will first determine whether the Ninth Circuit's ruling is consistent with previous Supreme Court rulings on speech that constitute threats of violence or may incite others to violent action, namely *Brandenburg v. Ohio*[17] and *Virginia v. Black*. Next, it will attempt to determine whether the Court has drawn a clear distinction between where hate speech is protected and where incitement is not protected. The article will then answer the question of whether Internet-based hate speech can meet the *Brandenburg* incitement test. Finally, it will argue that a new hate speech and incitement test is needed for the Internet to protect people from possible ensuing violence.

THE NINTH CIRCUIT COURT'S RULING ON THREATS

The Nuremburg Files case began in 1993 with the murders of three doctors who performed abortions. David Gunn, George

[9]*See id.*
[10]538 U.S. at 362.
[11]*Id.* at 360.
[12]505 U.S. 377 (1992).
[13]*Id.* at 380.
[14]521 U.S. 844 (1997).
[15]*Id.* at 850.
[16]American Coalition of Life Activists v. Planned Parenthood of the Columbia/Willamette, Inc., 539 U.S. 958 (2003).
[17]395 U.S. 444 (1969)

Patterson and John Bayard Britton were murdered after their names appeared on the "Wanted" posters sponsored by the American Coalition of Life Activists.[18] The posters were displayed in the *Life Advocate*, an anti-abortion magazine published by Advocates for Life Ministry (ALM).

In 1997, speech on the Internet became a First Amendment issue when ACLA sent a copy of the Nuremburg Files to Neal Horsley who, in turn, posted the information on the Internet.[19] Four abortion providers in Oregon filed the lawsuit after ACLA's Web site, the "Nuremburg Files," appeared with their names on it.[20] The plaintiffs sued to stop the posters from being published and distributed and to have the Web site removed.[21] More than 200 other abortion providers, judges, politicians and abortion rights supporters were also listed on the Web site.[22] The names were listed in two colors. If a name was in black, the doctor was alive; if a name was in gray, the doctor had been wounded.[23] A slash through a name meant the physician was dead; Gunn, Patterson and Britton had slashes striking through their names.[24] The Oregon doctors claimed they were targeted with threats from ACLA and ALM. Their lawsuit invoked the FACE and RICO statutes.[25] In the district court case, *Planned Parenthood of the Columbia/Willamette, Inc. v. ACLA*,[26] a jury ruled in favor of the plaintiffs.

ACLA and ALM appealed. A panel of the Ninth Circuit reversed the judgment.[27] It stated that while ACLA's posters and Web site may have brought attention to the doctors, it was an unrelated third

[18]Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists, 290 F.3d 1058, 1064 (9th Cir. 2002) (en banc).

[19]*Id.* at 1065.

[20]*Id.*

[21]*Id.* at 1063.

[22]*Id.*

[23]*Id.* at 1065.

[24]*Id.*

[25]FACE is the Freedom of Access to Clinics Entrance Act of 1994, 18 U.S.C. § 248 (2005). The law prohibits the use of force, threat of force, or physical obstruction to intentionally injure, intimidate or interfere with any person because that person has obtained or provided reproductive health services. The law also prohibits the intentional or attempted damage or destruction of a reproductive facility. RICO is the Racketeer Influence and Corrupt Organization Act, 18 U.S.C. § 1968 (2005), which, in part, allows people to sue if they are injured in their business or on their property. A district court jury awarded the four Oregon doctors damages under the FACE and RICO laws. The Ninth Circuit Court only reviewed the FACE damage awards. 290 F.3d at 1071.

[26]23 F. Supp. 2d 1182 (D. Or. 1998).

[27]244 F.3d 1007 (9th Cir. 2001).

party who was actually threatening them.[28] The Ninth Circuit reheard the case *en banc* and determined the posters and Web site constituted a threat against the lives of the Oregon doctors.[29]

ACLA contended its posters and Web site were not threatening but political and, therefore, protected speech.[30] The organization argued that its messages did not constitute incitement to imminent lawless action and, as a result, did not constitute a true threat.[31] It argued that its political speech could not become unprotected because a third party not affiliated with the organization committed a violent crime.[32]

The doctors argued ACLA's speech constituted a true threat.[33] One of the doctors, Warren Hern, stated the posters and Web site meant, "Do what we tell you to do, or we will kill you. And they do."[34] Another abortion provider, James Newhall, said he was "severely frightened" because every time there was a "Wanted" poster aimed at an individual that person was subsequently murdered. Newhall said he was afraid he was the next doctor to die.[35]

In overturning the panel, the court ruled the federal FACE law outlawed any threats or intimidation to abortion doctors.[36] The court then turned to Supreme Court rulings involving hate speech and incitement to violence. Specifically, the circuit court referred to *Brandenburg v. Ohio* and reiterated the position that the First Amendment protects speech that advocates violence as long as the speech is not directed to inciting or producing imminent violence.[37] Under the *Brandenburg* test, the court held, the posters and Web site were not protected.[38] The court ruled that had ACLA generically endorsed violence committed by others against abortion providers, its

[28]*Id.* at 1015.

[29]*Planned Parenthood of the Columbia/Willamette*, 290 F.3d 1058 (9th Cir. 2002) (en banc).

[30]*Id.* at 1070.

[31]*Id.*

[32]*Id.*

[33]*Id.* at 1071.

[34]*Id.* at 1066.

[35]*Id.*

[36]*Id.* at 1071.

[37]*Id.* (citing *Brandenburg,* 395 U.S. 444 (1969)). The Supreme Court in *Brandenburg* established a four-part test that defined when speech loses its protection: Mere advocacy to political action is protected speech; direction to incitement is protected speech if the speaker does not know actual incitement will result from the speech; words that lead to imminent illegal action itself are not protected**;** and the illegal action itself is not protected. 395 U.S. at 447–49. *See infra* notes 65–69 and accompanying text.

[38]*Id.*

speech may have been protected, but naming specific doctors crossed the *Brandenburg* line: "It is not necessary that the defendant intend to, or be able to carry out his threat; the only intent requirement for a true threat is that the defendant intentionally or knowingly communicate the threat."[39] The focus of the First Amendment argument on incitement is whether the listener seriously takes the communication as "intent to inflict bodily harm."[40] This distinguishes a true threat from speech that is merely frightening.[41]

The court did not agree with ACLA's position that its speech was made in public and, therefore, entitled to increased constitutional protection.[42] It stated that threats are unprotected by the First Amendment regardless of whether they are communicated in public or private.[43] The court defined threatening speech as:

> [A] statement which, in the entire context and under all the circumstances, a reasonable person would foresee would be interpreted by those to whom the statement is communicated as a serious expression of intent to inflict bodily harm upon that person.[44]

Within the context of abortion clinics, any threat with the intention of intimidation violates the federal FACE law. The court held the reaction of the recipient of the communication is paramount, especially when the threat is communicated directly to an individual and there is a possibility of ensuing violence based on previous similar circumstances.[45]

The court ruled specifically that the content of the Nuremburg Files Web site was not protected by the First Amendment. The site listed hundreds of names of pro-abortion supporters, including the murdered doctors, who had gray lines crossing out their names. The court affirmed the holding that the Web site constituted a threat to the Oregon doctors because of the way it portrayed the murdered doctors[46] and the listing of the doctors' addresses and telephone numbers. Had ACLA not placed this information on the Web site, the court said, the Web site may have been held to be protected speech.[47]

[39] *Id.* at 1075.
[40] *Id.*
[41] *Id.*
[42] *Id.* at 1076.
[43] *Id.*
[44] *Id.* at 1077.
[45] *Id.* at 1078.
[46] *Id.* at 1080.
[47] *Id.* at 1088.

The Web site was also unprotected because it acted as a "score card" in that it listed who was alive and dead.[48]

The opinion was handed down on an 8–3 vote. Judge Alex Kozinski dissented, disagreeing with the interpretation of a threat: "The difference between a true threat and protected expression is this: A true threat warns of violence or other harm that the speaker controls."[49] Kozinski posited that the posters and Web site rejected violence and advocated lawful means of persuading the plaintiffs to stop performing abortions or being punished for them.[50] He cited *NAACP v. Claiborne Hardware Co.*,[51] in which the Supreme Court held that speech does not lose its character because it embarrasses others or tries to coerce them into action. Kozinski contended that ACLA did not intend to resort to violence if the doctors did not stop performing abortions: "The posters and the Web site are designed both to rally political support for the views espoused by the defendants, and to intimidate plaintiffs and others like them into desisting abortion-related activities."[52]

Despite Kozinski's dissent that the ACLA posters and Web site did not constitute a threat against abortion providers, over the years the state and federal courts have been careful about protecting abortion clinics from violence. In deciding what constitutes free speech and legal protests, courts have applied the same considerations and rules from non-abortion-related cases where the First Amendment rights of protesters are involved.[53] The courts have stated there must be "delicate balancing" between the rights of protesters and the rights of unwilling viewers or listeners.[54] They have applied a clear and present danger test to cases involving picketing, breaches of the

[48]*Id.*

[49]*Id.* at 1089.

[50]*Id.* at 1090.

[51]458 U.S. 886 (1982).

[52]290 F.3d at 1093 (Kozinski, J., dissenting).

[53]*See, e.g.,* United States v. Weslin, 156 F.3d 292 (2d. Circ. 1998) (holding that FACE was not a viewpoint- or content-based regulation and that it applied to all persons who obstructed the provision of any reproductive health services, no matter their political stance); United States v. Dinwiddie, 76 F.3d 913 (8th Cir. 1996) (holding that the Constitution's Commerce Clause allowed Congress to protect people in interstate commerce, although the threat might come only from intrastate activities, and that FACE was a valid exercise of the commerce power); American Life League v. Reno, 47 F.3d 642 (4th Cir. 1995) (holding that FACE met the intermediate scrutiny test because it furthered a substantial government interest of protecting public health and commerce, and it was narrowly tailored to meet the government's interests). *See also* 1 AM. JUR. 2D *Abortion and Birth Control* § 59 (1994).

[54]*Dinwiddie,* 76 F.3d. at 927.

peace and disorderly conduct.[55] Utterances at abortion clinics that incite crimes or breaches of the peace may be punished without violating First Amendment rights.[56] The FACE law allows abortion clinics to provide medical services free from interference that may endanger its patients.[57] Consistent with FACE, the Ninth Circuit upheld the district court verdict on the posters and the Nuremburg Files Web site, citing *Brandenburg*.[58]

THE *BRANDENBURG* TEST

In 1969, the Court delivered one of its landmark decisions on incitement and hate speech. In *Brandenburg v. Ohio,*[59] an Ohio Klu Klux Klan leader was convicted under a state statute that punished advocating violence as a means of political change. Clarence Brandenburg was quoted as saying, at a Klan rally, "We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken."[60]

In a *per curiam* opinion, the Court overturned the law, stating the First Amendment does not permit a state to forbid advocacy of the use of force except where the advocacy is directed to imminent incitement.[61] The teaching of resorting to violence does not equal actually preparing a group for violent action.[62] The Court stated any hate speech statute must distinguish between the two concepts of advocacy and actually preparing for violence.[63] The only time speech can be limited is if violence is imminent:

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[64]

[55] *Id.*
[56] *See American Life League*, 47 F.3d at 647.
[57] *See supra* note 25.
[58] Planned Parenthood of the Columbia/Willamette, Inc., 290 F.3d 1058, 1071 (9th Cir. 2002) (en banc).
[59] 395 U.S. 444 (1969).
[60] *Id.* at 446.
[61] *Id.* at 447.
[62] *Id.*
[63] *Id.* at 448.
[64] *Id.* at 447.

The court emphasized that an abstract teaching of a "resort to violence" is not the same as actually preparing a group for violent action.[65]

What is now known as the *Brandenburg* test is the basis for determining the constitutionality of speech that advocates violence. The test has four parts:

- There must be advocacy of violent action; words that inform an audience about the speaker's hopes and beliefs and might include the "mere abstract teaching" of political reform are protected.[66]
- Speech must go beyond mere advocacy. If the defendant is only aware that his words will incite illegal action but does not have the incitement in mind as his purpose, his speech is protected.[67] If the speaker knows his words will likely trigger an illegal action, then the speech is not protected.[68]
- The speech must be likely to produce imminent violence. This is at the heart of *Brandenburg*. It means only a very short time may pass between the advocacy and the resulting violence.[69]
- There must be a likelihood of illegal action. When the illegal action takes place in the form of violence, it loses any First Amendment protection.[70] If speech leads to violence, then it is the direct result from the third part of the test, imminence.

SPEECH AND INTIMIDATION

The most recent ruling involving hate speech and incitement is *Virginia v. Black*.[71] In an 8–1 vote, the Court outlawed cross burning aimed at intimidating people. The Court held that it is legal to ban conduct such as the burning of a cross but not the expression—the ideas associated with the act. The Court overturned the part of the Virginia statute that declared that all burning of crosses is automatically a form of intimidation.[72] Writing for the majority, Justice Sandra Day O'Connor stated that a prohibition on true threats protects individuals from the fear of violence and the ensuing disruption to

[65]*Id.*
[66]*Id.*
[67]*Id.*
[68]*Id.* at 449.
[69]*Id.* at 434.
[70]*Id.*
[71]538 U.S. 343 (2003).
[72]*Id.* at 365.

their lives.[73] Justice O'Connor's opinion defined a true threat as "those statements where the speaker means to communicate a serious expression of intent to commit an act of unlawful violence to a particular individual or group of individuals."[74] She wrote that burning a cross is a very powerful message:

> [T]he burning cross often serves as a message of intimidation, designed to inspire in the victim a fear of bodily harm. Moreover, the history of violence associated with the Klan shows that the possibility of injury or death is not just hypothetical.[75]

Justice O'Connor wrote that a speaker does not need to actually carry out a threat in order for the speech to be proscribable. Rather, a prohibition on true threats "protects individuals from the fear of violence" and "from the disruption that fear engenders."[76] Intimidation is a threat when a speaker intends to place a person or group of people in fear of bodily harm or death.[77] In the *Planned Parenthood* case, the doctors in Oregon wore bulletproof vests because they said they feared for their lives. The Ninth Circuit Court, therefore, held that the doctors' lives were at risk.[78]

The question is whether the Ninth Circuit's decision is consistent with the Court's decisions in *Brandenburg* and *Virginia v. Black*. When examined solely from the context of *Brandenburg*, the appeals court decision is wrong. The *Brandenburg* test relies on imminence as a key indicator to determine which speech should lose its protection. The threats against the Oregon abortion providers did not lead to imminent violence. It is not known if the posters and Web site were the catalysts for the threats, but those symbols never specifically threatened imminent danger of violence toward the doctors.

A persuasive argument can be made in favor of the Ninth Circuit's ruling when based on *Virginia v. Black*. The Court has stated that cross burning and intimidation can go hand in hand. Justice O'Connor specifically wrote that a speaker need not actually carry out the threat for the speech to be proscribable.[79] A prohibition on threats, authorized by *Virginia v. Black*, includes protecting individ-

[73]*Id.* at 360.
[74]*Id.* at 359.
[75]*Id.* at 357.
[76]*Id.* at 360.
[77]*Id.*
[78]Planned Parenthood of the Columbia/Willamette, Inc., 290 F.3d 1058, 1085 (9th Cir. 2002) (en banc).
[79]538 U.S. at 369.

uals from a fear of violence.[80] The bulletproof vests reflect a real fear the doctors had for their lives. Doctors Warren Hern and Elizabeth Newhall stated that they interpreted the posters and Web site to mean that if they did not stop performing their jobs, their lives were at risk.[81] The Ninth Circuit indicated that had the Nuremburg Files not acted as a "score card" of living and dead doctors, it may have been protected speech.[82] The Web site had too much personal information about the doctors, causing them to fear for their lives.

Virginia v. Black, as the most recent decision by the Supreme Court involving hate speech and violence, is the framework by which the Ninth Circuit's opinion must be examined. While the dissenters in the *Planned Parenthood* case wrote that the Web site and posters foreswore the use of violence, the doctors still felt intimidated,[83] falling within the paramaters of the holding in *Virginia v. Black* that a victim's fear is paramount when speech and threats coincide.

PROTECTED SPEECH ANJD ILLEGAL INCITEMENT

The Court in *Brandenburg* and *Virginia v. Black* tried to draw a line separating constitutionally protected speech from unprotected speech and incitement to violence. Over the years, "incitement" has been used with terms such as "breach of peace" and "violence." The Court has dealt with hate speech or intimidating speech in some half-dozen cases. While the cases may not directly impact the outcome of the Oregon abortion doctors' case, they demonstrate the Court's evolution in the controversial area of violent speech.

In the 1942 case *Chaplinsky v. New Hampshire*,[84] the Court upheld a New Hampshire statute that banned the use of fighting words because such words could cause a breach of the peace. Walter Chaplinsky, who was a member of the Jehovah's Witnesses, had called the town marshall a "damned fascist" and "damned racketeer."[85] The Court stated these words would likely provoke a person to respond with violence.[86]

The Court stated in *Chaplinsky* that there are certain well-defined and narrowly limited areas of speech that could be banned without violating the First Amendment. These included lewd, obscene, pro-

[80]*Id.*
[81]*Planned Parenthood,* 290 F.3d at 1066.
[82]*Id.* at 1085.
[83]*Id.* at 1093.
[84]315 U.S. 568 (1942).
[85]*Id.* at 570.
[86]*Id.* at 573.

fane and libelous speech and fighting words that tend to incite violence and cause injury:

> It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[87]

The Court said ordinary adults would have to judge whether certain words could cause violence. While the terms, "damned Fascist" and "damned racketeer" may be tame by today's standards, in the 1940s, as shown in the Court's *Chaplinsky* ruling, such terms could lead to violence. The important aspect of the Court's ruling is that it laid a foundation for the eventual *Brandenburg* principle of imminent violence.

The Court decided the next major hate speech case in 1951. In *Beauharnais v. Illinois*,[88] the Court upheld the constitutionality of an Illinois statute that prohibited the selling, manufacturing, publishing, advertising or exhibition of any lithograph, picture or play that criticized anyone based on race, color, creed or religion.[89] It stated that libelous utterances are not protected speech when they may cause a breach of the peace.[90] Reaffirming its earlier *Chaplinsky* decision, the Court noted that such speech has no redeeming social value.[91] The Court stated that keeping the general peace was a top priority and hate speech would run counter to this goal.

In *Beauharnais,* the Court also ruled that an individual, not just a group of people, could be a target of hate speech through "public hatred, contempt, or financial injury."[92] The Court referred to these actions as libelous utterances.[93] This is important because *Beauharnais* reflected the Court's concern for the physical well being of both groups and individuals who may be the targets of threats. It stated that if utterances are directed at a defined group and may disrupt the peace, those utterances could be outlawed.[94] The Ninth Circuit Court of Appeals used this same approach in its Nuremburg Files ruling.[95]

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[87]*Id*.
[88]343 U.S. 250 (1952).
[89]*Id*. at 250.
[90]*Id*. at 253.
[91]*Id*. at 257.
[92]*Id*.
[93]*Id*. at 253.
[94]*Id*. at 258.
[95]Planned Parenthood of the Columbia/Willamette, Inc., 290 F.3d 1058, 1086 (9th Cir. 2002) (en banc).

The Court defined "true threats" in 1969 in *Watts v. United States*.[96] During a public rally in 1966 near the Washington Monument, an eighteen-year-old man took part in a conversation on the Vietnam War. He stated his views opposing the draft and then said, "I am not going [to Vietnam]. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J."[97] He was arrested for threatening President Lyndon B. Johnson. In 1969, the Court overturned his conviction.[98] In a *per curiam* decision, the Court made clear that free speech includes debate on public issues where the debate is wide open and robust.[99] At times, the Court indicated, this may include sharp attacks on the government and certain public officials: "The language of the political arena, like the language used in labor disputes … is often vituperative, abusive, and inexact."[100] The Court noted the importance in distinguishing between an actual threat and language used in discussing political affairs that is hyperbolic by nature.[101] Protected political speech includes statements that disagree with the government's position on an issue, but it becomes unprotected when there is a serous threat with a specific plan of action that may encourage others to act violently at a specific time.

Since *Beauharnais* and *Chaplinsky*, the Court has moved away from striking down laws that limit speech because it might lead to a breach of peace. In 1966 in *Ashton v. Kentucky*,[102] the Court overturned a Kentucky criminal libel statute that punished people for speech that could lead to a disturbance of the peace. The Court ruled the state law was vague, and, therefore, local authorities would have too much leeway in determining which threats might lead to a breach of peace.[103] It noted that when local authorities have too much power to regulate conduct, speech suffers.[104]

Free speech and threats and intimidation came before the Court in 1982 in *NAACP v. Claiborne Hardware Co*.[105] In 1966, the National Association for the Advancement of Colored People (NAACP) chapter in Claiborne County, Mississippi, boycotted the town's white merchants to protest equality and racial injustice. As part of the boycott,

[96]395 U.S. 705 (1969) (per curiam).
[97]*Id.* at 706.
[98]*Id.*
[99]*Id.* at 708.
[100]*Id.*
[101]*Id.* at 707.
[102]384 U.S. 196 (1966).
[103]*Id.* at 199.
[104]*Id.* at 200.
[105]458 U.S. 886 (1982).

the NAACP's leader, Charles Evers, on April 1, 1966, warned boycott violators they would be "disciplined" by their own people if they shopped at stores owned by the white merchants or cooperated with the local sheriff.[106] Some of the organization's members stood outside the stores and kept a record of who violated the boycott.[107] The names of those people were then read at the NACCP meetings and published in a local, black-owned paper, the *Black Times*.[108] There were ten incidents of violence against people who ignored the boycott. These incidents included gun shots fired into one couple's home and a commercial fisherman who was beaten up.[109] Pro-boycott petitioners admitted to trying to persuade others to join the economic protest through social pressure and threats of ostracism.[110]

When the case reached the Court sixteen years later, it ruled the NAACP members' use of intimidation was protected speech. The Court concluded speech "does not lose its protected character, … simply because it may embarrass others or coerce them into action."[111] Since peaceful political activity such as a boycott is legal, the Court found the non-violent elements of the petitioners' activities entitled to First Amendment protection.[112] The NACCP members' act of standing outside a store and recording names of boycott violators was not illegal. Had these people committed acts of violence against the boycott violators, they would be held responsible for the injuries that would have ensued.[113]

Evers' threats or warnings of social ostracism were constitutionally protected. As in *Brandenburg*, Evers' use of teaching a resort to force and violence does not mean actually preparing a group for violent action.[114] If the violent episodes had immediately followed Evers' speeches, then he would have been held liable, but the sporadic acts of violence occurred weeks and months after his speech, and the Court said the speech did not fit *Brandenburg's* imminence requirement: "An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech."[115]

[106] *Id*. at 902.
[107] *Id*. at 904.
[108] *Id*.
[109] *Id*. at 905.
[110] *Id*. at 897.
[111] *Id*. at 910.
[112] *Id*. at 915.
[113] *Id*. at 926.
[114] *Id*. at 928.
[115] *Id*.

The Court's 1992 decision in *R.A.V. v. St. Paul*[116] was one of its most complicated involving hate speech and incitement. While *R.A.V.* did not include a prohibition against fighting words or breach of the peace, it prohibited the display of symbols and words that *aroused* anger on the basis of race, color, creed, religion or gender.[117] The Court approached *R.A.V.* differently than the previous cases in that it struck down the ordinance because it prohibited speech solely on the basis of the subjects the speech addressed. Writing for the majority, Justice Antonin Scalia stated the First Amendment did not permit the government to impose special prohibitions, content-based restrictions, on speakers who express views on disfavored subjects.[118] More specifically, the ordinance's First Amendment weakness was that it would permit displays containing abusive words or symbols if they were on subjects other than race, color, creed, religion or gender. While these subject matters would be illegal, offensive symbols or words that arouse anger about a person's occupation, political affiliation or sexual orientation would be legal.[119] For the Court, this ordinance amounted to viewpoint discrimination.

If an ordinance like this were allowed to stand, the Court warned of a danger: "[The] regulation of 'fighting words,' like the regulation of noisy speech, may address some offensive instances and leave other, equally offensive, instances alone."[120] In his concurring opinion, Justice Byron White wrote that any prohibition on fighting words is not simply a time, place or manner restriction, but a ban on a category of speech that portrays a thematic message even if the message is unpopular.[121] The notion that certain expressions may cause hurt feelings or resentment does not mean they can be stripped of First Amendment protection.[122]

What the decisions from these six cases have in common is that the Court has ruled that when speech crosses into the arena of violence, it loses its First Amendment protection. While the *Ashton* case may have abandoned breach of peace as justification for a speech law, the Court continued to rule that when speech crosses a point and endangers someone or leads to general violence, it may be proscribed. In *Brandenburg*, the Court specified the imminence factor for outlawing hate speech, but equally important, these six cases show the

[116]505 U.S. 377 (1992).
[117]*Id.* at 379.
[118]*Id.* at 381.
[119]*Id.* at 391.
[120]*Id.* at 390.
[121]*Id.* at 409 (White, J., concurring).
[122]*Id.* at 414 (White, J., concurring).

Court's continued emphasis in focusing on violence that results from hate speech.

Even before the Internet age, when the Court was defining hate speech and incitement, scholars were addressing the issue. Thomas Emerson wrote that group libel laws are designed to promote order by eliminating "friction among racial, religious, national, or similar groups."[123] Emerson noted that group libel laws seek to remove sources of group conflict within society:

> In general they seek to prohibit, through criminal or civil process, communications that are abusive, offensive, or derogatory with respect to a group, or that tend to arouse public contempt, prejudice, or hatred toward the group.[124]

He also criticized as vague and overbroad several laws that attempted to punish conduct. Emerson agreed with the Court's decision in *Chaplinsky* because it was narrowly tailored.[125] He offered guidelines for legislators who want to reduce hate crimes: "But when the draftsman seeks to incorporate some expression within the statutory prohibition, he must make clear what expression is in and what is out, and he cannot go over the constitutional boundary."[126] Emerson warns that while repressing expression is legal, state and local ordinances tend to cut far more widely and deeply than is necessary to control the conduct.[127]

Kent Greenawalt wrote that the danger with insults directed at individuals and groups of people is that they may cause a listener or listeners to react violently.[128] He agrees with Emerson's assessment that words which are likely to provoke violence should be outlawed through state and local statutes.[129] He writes that the courts have agreed that restrictions are legal if there is a danger of violence resulting from the spoken words, and there should be laws against hate speech when words are spoken with the intention of promoting violence.[130]

[123]THOMAS EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 391 (1970).
[124]*Id.* at 392.
[125]*Id.* at 365.
[126]*Id.* at 366.
[127]*Id.* at 10.
[128]KENT GREENAWALT, FIGHTING WORDS: INDIVIDUALS, COMMUNITIES, AND LIBERTIES OF SPEECH 50 (1995).
[129]*Id.*
[130]*Id.* at 51.

People within defined communities are usually the targets of hate speech. In his definition of communities, Greenawalt goes beyond race, religion and ethnicity and includes "families, professional associations, and gender."[131] If communities can include professional associations, an argument can be made that the targeted abortion providers constitute a distinct community that was victimized by hate speech that promoted violence. The promoters of the anti-abortion messages, ACLA, can also be defined as a distinct community. Greenawalt writes that community leaders can spur their followers into illegal actions without careful consideration of the persuasiveness of their messages: "[E]ven if the speaker stops short of commanding action, his responsibility is too great to bar his punishment."[132]

Steven Heyman elaborates on Greenawalt's point and argues that hate speech becomes unconstitutional when it threatens someone's physical safety.[133] The Ninth Circuit Court used a similar argument in its decision on the Nuremburg Files Web site.[134] Heyman posits that hate speech denies respect to the targeted person and the denial results in a violation of the person's personal security.[135]

When hate speech takes the form of anonymous threatening messages, it becomes an invasion of privacy and this often equals violating criminal harassment laws.[136] People who use hate speech view their targets not as people, but as objects devoid of personality.[137] Victims often suffer intense emotional pain because their privacy is invaded. The Ninth Circuit's ruling is based on this philosophy. The abortion providers' privacy was invaded when their addresses and telephone numbers were listed on the Nuremburg Files Web site. When threats are made, Heyman posits, hate speech does not equal political speech and does not deserve First Amendment protection.[138] Hate speakers do not engage in political speech because they do not see their targeted audience as fellow citizens but as objects for hatred and contempt. In this regard, hate speech does not deserve First Amendment protection because it does not relate to matters of public policy.[139] Using Heyman's position, it can be argued that the anti-abortion organizations, the ACLA and

[131]*Id.* at 133.
[132]KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 269 (1989).
[133]STEVEN J. HEYMAN, HATE SPEECH AND THE CONSTITUTION xlii (1996).
[134]*Planned Parenthood,* 290 F.3d 1058, 1085 (9th Cir. 2002) (en banc).
[135]HEYMAN, *supra* note 133, at xliii.
[136]*Id.* at xlvi.
[137]*Id.*
[138]*Id.* at lv.
[139]*Id.* at lvi.

ALM, did not deserve First Amendment protections because their posters and Web site went beyond political speech to actual threats against specific people.

In bridging the line between hate speech and incitement in the Internet age, it is important to remember the Internet is neither a print nor a broadcast mass media forum.[140] There are regulations for broadcast while print has hardly any, but the Internet blurs the lines of information because people can be their own publishers of information.[141] In this one communications medium, there are corporate, commercial and political forms of speech. The Internet is an ideal free speech medium because it allows for widespread audiences, a high speed of communication, anonymity of speakers and listeners, and an low economic barrier to entry.[142]

Scott Hammock states that the Internet has a reputation as a forum for "marginal" members of society.[143] These marginalized people are more likely to carry out threats, and, therefore, an Internet threat is more intimidating than threats *via* other media forums. The Internet has the ability to reach a large and widespread audience, including people who may be members of fringe organizations. The Internet's dispersal into a wider audience increases the likelihood threatening messages would fall into the hands of an extremist. The doctors had every right to worry about who could have been viewing the extremist pro-life Web site and were incited to take action. The fear with the Nuremburg Files was that the people who read the Web site and were inspired to carry out violent acts toward the doctors may have come from a marginalized part of society.

The Court's decisions in the preceding six cases narrow and define where hate speech is acceptable and at what point it crosses into unprotected ground. The Court consistently ruled that when speech may initiate a violent breach of peace and threaten an intended victim, it loses it's First Amendment protection. The future challenge before the courts and leading First Amendment scholars is how to apply this standard to the Internet.

[140]*See* JEREMY HARRIS LIPSCHULTZ, FREE EXPRESSION IN THE AGE OF THE INTERNET 10 (2000).

[141]*See id*.

[142]*See* Scott Hammock, *The Internet Loophole: Why Threatening Speech On-line Requires a Modification of the Court's Approach to True Threats and Incitement,* 36 COLUM. J.L. & SOC. PROBS. 85 (2002).

[143]*Id*. at 84.

INTERNET HATE SPEECH AND THE *BRANDENBURG* TEST

Since the Nuremburg Files case is the first of its type to address Internet hate speech and incitement to violence, the issue is whether the *Brandenburg* test is applicable to the Internet. The courts have rejected applying the test to music and broadcasting.[144] The Supreme Court has found that the Internet deserves maximum free speech protection, similar to that given to the print media.[145] The issue becomes whether the second part of the *Brandenburg* test, imminence, can be applied to the Internet. The Internet is not simply a place for posting Web sites, it also contains chat rooms and instant messaging services.[146] These act in real time, similar to telephone conversations or public rallies, allowing two or more people to communicate nearly instantly. If a threat is communicated in this context, imminence is likely if the person who commits a premeditated act is physically near the target.

It is even more likely that the communicators could be literally anywhere on the planet where there is a connection to a telephone or high-speed line. In this case, the imminence factor does not work because the perpetrator would have to travel.[147] Jeremy Lipschultz writes that many Web site readers are part of "loosely knit social networks," like-minded people who may live anywhere around the world: "Under such conditions, we would expect free expression to be more open because the threat of retaliation is limited by the homogeneity of the group, as well as by geographic distance between its members and the perceived anonymity."[148]

With Internet users spread across a wide geography, it may be unlikely that online speech would incite imminent violence. Once a publisher places content onto a Web site, it could be days, weeks or possibly even years before a user accesses it. With this potential timeline, it is not possible to literally apply *Brandenburg's* imminence requirement to the Internet. The *Brandenburg* test assumes a speaker-audience relationship that does not exist with Web

[144]*See* McCollum v. CBS, 202 Cal. App. 3d 989 (1988) (rejecting the claim that a teenage son committed suicide because the lyrics from an Ozzy Osbourne song caused the son to act violently in taking his life); Olivia v. Nat'l Broad. Co., Inc., 126 Cal. App. 3d 488 (1981) (rejecting the claim that a girl was "artificially" raped by a group of assailants because they had been incited by a television movie *Born Innocent*).

[145]*See* Reno v. ACLU, 521 U.S. 844, 850 (1997).

[146]*See* John P. Cronan, *The Next Challenge for the First Amendment: The Framework for an Internet Incitement Standard,* 51 CATH. U.L. REV. 425 (2002).

[147]*See id*. at 451.

[148]LIPSCHULTZ, *supra* note 140, at 16.

sites.[149] The Nuremburg Files site was not a platform by which anti-abortion groups could immediately instruct their followers to incite imminent violence against abortion providers. Unlike people who speak in front of live audiences, as Charles Evers did in 1966,[150] creators of Web sites do not know exactly who is viewing their sites—they do not know who their audience actually is.

Even though the *Brandenburg* test for incitement cannot literally apply to the Internet, that does not mean the spirit of *Brandenburg* cannot be applied to protecting First Amendment speech and prosecuting would be perpetrators of violence who post threatening messages.[151] Changing perspectives on the speaker-audience relationship could help re-fashion *Brandenburg* for outlawing any Internet hate speech that has a tendency toward violence. The idea of an imminence requirement could be applied to the perspective of creators of a Web site and their visitors by answering three important questions:[152]

- First, does the visitor believe the words on the Web site are likely to convince someone to commit a violent act?
- Second, would the same words, if spoken, incite others to violence? By listing doctors' addresses and telephone numbers, the Nuremburg Files Web site gave its audience the information it needed to commit a violent crime.
- Third, who is likely to visit the Web site?[153] Anti-abortion advocates are more likely to visit the Nuremburg Files site, and more specifically, people who have very strong beliefs about abortion to the point that they may type in search terms such as "baby butchers" or "slaughtered babies."[154]

Whether this approach or another is used to alter the *Brandenburg* test, it is important the courts adapt a new approach for the Internet. The *Brandenburg* test applies to verbally spoken face-to-face speech but does not speak directly to an online environment.[155] The Internet is set up so an individual's computer is not invaded with hate speech; rather the user needs to take a series of steps

[149]*See* Cronan, *supra* note 146, at 452.
[150]*See* NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982).
[151]*See* Cronan, *supra* note 146, at 455.
[152]*See id.* at 457.
[153]*See id.* at 462.
[154]*See id.*
[155]*See* Jason Schlosberg, *Judgment on Nuremburg: An Analysis of Free Speech and Anti-Abortion Threats Made on the Internet,* 7 B.U. J. SCI. & TECH. L. 52, 65 (2001).

to find it.[156] The test's imminence component is not likely to work online because of too many unknown variables.

CONCLUSION

The ruling of Ninth Circuit Court in the Nuremberg Files case was not consistent with previous Supreme Court rulings on hate speech and incitement. The evidence indicates that in the context of the *Brandenburg* case, the appellate court's ruling was wrong because the Web site did not impose an imminent threat to the doctors. When judged in the context of *Virginia v. Black*, the Ninth Circuit's ruling is valid because the doctors saw themselves as potential victims because their names, addresses and telephone numbers were listed in a score card fashion.

The courts could look to *Virginia v. Black* as a guide in this arena. In that case, the Court laid out the needed groundwork for limiting hate speech when victims perceive threats that instill fear and anxious feelings about their safety. While *Virginia v. Black* was not an Internet-related case, its legal foundations can still be applied to the Internet. Thus, the idea of *Brandenburg* is preserved, but the test is modified for the Internet age.

The Supreme Court has delineated a consistent definition over the years of where free speech is permissible and where it crosses into an arena where violence or breach of peace is likely. The Court has effectively explained where this line exists. The *Chaplinsky* case upheld a New Hampshire law that prohibited certain words because in the context of the 1940s they were likely to lead to violence. *Chaplinsky* set up the framework for the Court's free speech decisions in *Watts*, *NAACP* and *R.A.V.*

The law is not as explicit in the arena of Internet-related hate speech. *Brandenburg* outlaws incitement in the context of a verbal exchange between parties when imminent violence is about to erupt, but the Internet does not allow for *Brandenburg's* imminence requirement. If the courts find it necessary to protect people from hate speech on the Internet when incitement or a violent episode is likely, a retooling of *Brandenburg* is needed. Perhaps *Virginia v. Black* will guide the courts.

[156] *Id.* at 68.